INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	4
Argument	14
Conclusion	26

CITATIONS

Cases:

Berkshire Employees Association v. *National Labor Relations Board*, 121 F. 2d 235	21
Bi-Metallic Investment Co. v. *State Board, etc.*, 239 U. S. 441	17
Bowles, etc. v. *Willingham et al.*, 321 U. S. 503	17
Dorsey v. *Kingland*, 173 F. 2d 405	21
Federal Security Administrator v. *Quaker Oats Company*, 318 U. S. 218	16, 17
Morgan v. *United States*, 298 U. S. 468	18
Morgan v. *United States*, 304 U. S. 1	18, 19
Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294	17
Pacific States Box & Basket Co. v. *White et al.*, 296 U. S. 176	17
Powhatan Mining Co. v. *Ickes*, 118 F. 2d 105	21

Statutes:

Administrative Procedure Act (60 Stat. 237; 5 U.S.C. 1001 *et seq.*):	
Sec. 2	24
Sec. 4	24
Sec. 5	23
Sec. 7	24
Sec. 8	24
Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*:	
Sec. 401	2
Sec. 701	3, 19, 22

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947), p. 50	24
H. Rep. 1980, 79th Cong., 2d sess., p. 30	25
S. Doc. 248, 79th Cong., 2d sess., pp. 24-25	25
S. Rep. 752, 79th Cong., 1st sess., p. 18	25

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 280

WILLAPOINT OYSTERS, INC., PETITIONER

v.

OSCAR R. EWING, ADMINISTRATOR, AND J. DONALD KINGSLEY, ACTING ADMINISTRATOR, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion (R. Vol. XI, p. 1) of the Court of Appeals is reported at 174 F. 2d 676. The administrative orders under review (R. Vol. II, p. 40 and Vol. IX, p. 1) were published at 13 F. R. 1337, 4663.

JURISDICTION

The judgment of the Court of Appeals was entered April 29, 1949 (R. Vol. XI, p. 33). A petition for rehearing (R. Vol. XII, p. 1) was denied June 3, 1949 (R. Vol. XII, p. 53). The petition for a writ of certiorari was filed August 19, 1949. The jurisdiction of this Court is involved under 28 U. S. C. 1254(1) and Section 701(f)(4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1040, 1055, 21 U. S. C. 371(f)(4).

QUESTIONS PRESENTED

1. Whether, in a rule-making proceeding incident to the establishment of a standard of fill of container for canned oysters under the Federal Food, Drug and Cosmetic Act, the hearing examiner's rejection of an offer of proof intended to show that the separation-of-functions requirement of Section 5(c) of the Administrative Procedure Act, 5 U. S. C. 1004(c), had not been observed, denied petitioner means of vindicating a right to a "fair hearing" guaranteed by the due process clause of the Fifth Amendment.

2. Whether the rejection of the offer of proof was contrary to the provisions of the Administrative Procedure Act.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U. S. C. 301 et seq., provides:

> SEC. 401. Whenever in the judgment of the Administrator such action will promote hon-

esty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container; * * * [21 U. S. C. 341.]

SEC. 701 * * *

* * * * *

(e) The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of the Act: 401 * * * At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing * * * the regulation * * *. The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. * * *

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place

of business, for a judicial review of such order. * * *

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. * * * The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive.

[21 U.S.C. 371.]

STATEMENT

This is a special statutory proceeding for judicial review of orders of the Federal Security Administrator which established a definition and standard of identity and a standard of fill of con-

tainer for canned oysters. The orders, which are by nature rule-making in that they establish regulations of general applicability, were promulgated under the authority of Section 401 of the Federal Food, Drug, and Cosmetic Act, *supra*, pp. 2-3.

(1) *Historical background.*—Oysters are canned commercially in three areas of the United States, the South Atlantic coastal area, the Gulf area, and the Pacific Northwest (R. Vol. III, p. 33). The markets for the canned food are primarily in the mid-west and western states (R. Vol. III, pp. 17, 18).

Before 1942, canners of oysters in all areas filled the No. 1 Eastern Oyster can, the can in principal use, to yield a drained or cut-out weight of 5 ounces of oysters. This practice was condoned by an early official expression of the Food and Drug Administration that such a fill would not be considered adulterated on a charge that excessive brine had been substituted in part for oysters (R. Vol. IV, Ex. 3). In 1942 the supply of tin plate became short, and the War Production Board decided that there was wastage of tin plate in oyster canning because of the light 5-ounce fill. Conservation Order M-81 was issued, and it effectively denied tin plate to oyster canners except where No. 1 EO cans were filled to yield at least 7½ ounces of oysters (R. Vol. III, p. 448; Vol. II, p. 42, Finding 1).

Shortly thereafter, the Federal Security Administrator announced that a public hearing would be

held, under the Federal Food, Drug, and Cosmetic Act, upon a proposal to establish a fill of container standard for canned oysters. Public proceedings were held in accordance with law, and on November 18, 1944, the standard was promulgated (R. Vol. IV, Ex. 3). It required a drained weight of not less than 68% of the water capacity of the container (7½ ounces for the No. 1 EO can). The standard was made to apply to canned oysters that averaged less than ½ ounce each, and was largely inapplicable to Pacific oysters because they average more than ½ ounce. Canners of Pacific oysters had discontinued canning in 1942. (R. Vol. I, p. 49, Finding 12.) That order was not challenged.

In the spring of 1946, canning operations began anew on the Pacific coast, and there soon appeared in the same markets in competition canned Pacific oysters in the No. 1 EO can with cut-out weight of approximately 5 ounces and Atlantic and Gulf oysters in the same size can with cut-out weight of 7½ ounces of oysters. The difference in the amounts of oysters in cans was known to wholesale dealers, but was not generally known to retailers or to consumers, with the result that there was likelihood of deception of consumers who would purchase the canned product on the basis of size of container alone without knowledge of the weight differential (R. Vol. II, p. 43, Finding 5). The existing standard gave a decided competitive advantage to canners who were not bound by it and were using the 5-ounce fill.

(2) *The March 10, 1948, order.*—The Federal Security Administrator ordered a public proceeding upon proposals to adopt standards of identity and a standard of fill of container (R. Vol. III, p. 4; Vol. II, p. 118). A public hearing was held in which the Food and Drug Administration and canners of Pacific and Gulf oysters participated (R. Vols. III and IV), a tentative order was published (R. Vol. II, p. 115a), exceptions were filed (R. Vol. II, pp. 84, 86), and petitioner filed a request for postponement and reconsideration of the tentative order (R. Vol. II, p. 52). Petitioner's counsel conferred with Administrator Ewing in order to support his request (R. Vol. II, p. 51). On March 10, 1948, a final order was issued (R. Vol. II, p. 40).

This order contained detailed findings of fact. The findings, reciting first the existing requirements as to fill of container (Findings 1-3), were to the effect that the 7½ ounce fill to which Eastern and Gulf packers had been subject caused minor manufacturing difficulties and some changes in the oysters (Finding 3); that canned Pacific oysters packed to the cut-out weight in use prior to 1942—5 ounces—were not well filled (Finding 4); that sale in the same markets of No. 1 cans of oysters some of which were filled to yield 7½ ounces of meat and some of which were filled to yield only 5 ounces was likely to confuse and deceive consumers who generally did not know of the difference in fill (Finding 5); that in respect of Pacific oysters

there had been no commercial practice of filling cans to capacity and thus no basis of commercial experience on which to determine the maximum fill that could be used without impairment of quality (Finding 6); but that experimental packs made in West Coast canneries both by canners of Pacific oysters and the Food and Drug Administration showed that Pacific oysters could be packed to yield a cut-out weight of at least 6½ ounces from the No. 1 can without significant impairment of the quality of the food (Findings 6-8). (R. Vol. II, pp. 40-45.)

The Administrator concluded that it would not promote honesty and fair dealing in the interest of consumers to return to the 5-ounce fill; that honesty and fair dealing in the interest of consumers would not be promoted by establishing separate standards of fill of container for oysters of different sizes or species; and that a 6½ ounce drained weight from the No. 1 can could be met by all canners with any heat treatment and without impairment of quality.

(3) *The remand and the August 5, 1948, order.*— A petition for judicial review was filed by petitioner alone on May 22, 1948, together with a motion for leave to adduce additional evidence (R. Vol. I, p. 1). Petitioner represented that subsequent to the public hearing it had developed and put into commercial operation an entirely new method of preparing oysters for canning, described as a blanching

method. Petitioner alleged that the record contained no evidence respecting this new method, and asserted that the March 10 order would preclude its use and would destroy petitioner's business.

The Court of Appeals granted the motion on June 8, 1948, ordering the proceeding remanded "with direction to take such additional evidence (and evidence in rebuttal thereof) as may be offered relative to said process of packing blanched oysters, within a period of 30 days from the date of this Order on such reasonable notice to the petitioner as he may give" (R. Vol. V, pp. 40, 42).

The Administrator complied with this mandate (R. Vol. VI and VII). It was at the hearing on the remand that the claimed error upon which petitioner relies was committed. During the cross-examination of a witness for the Food and Drug Administration, he was asked (R. Vol. VI, pp. 960-962) whether he had a hand in preparing, or whether he had written, the March 10 order. The questions were objected to on the ground that the Administrator's decisional process was not a proper subject of interrogation. The hearing examiner ruled that he did not consider the questions pertinent to the issue before him. Shortly thereafter, the witness again was asked whether either he or the attorney appearing on behalf of the Food and Drug Administration contributed a specified sentence to the language of the March 10 order. (R. Vol. VII, pp. 991-992.) Objection was sustained, and petitioner

made an offer of proof as follows (R. Vol. VII, pp. 993-994):

> MR. STEPHAN: I offer to prove by these questions presently addressed to Mr. Callaway and likewise questions yesterday that, in violation of my understanding of the Administrative Procedure Act, Section 5(c), the order in issue of March 10, 1948, violates so much of that section as provides that "save to the extent required for the disposition of ex-parte matters as authorized by law, no such officer (referring to the officers who presided at the hearings) shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor shall such officer——"
>
> PRESIDING OFFICER GODING: I hesitate to do this, but I think I am constrained to break in on you. I think what you are reading is entirely irrelevant to these proceedings, because what you are referring to, sir, relates exclusively to quasi-judicial matters; this is a rule making hearing and it is quasi-legislative, and I do not think you are gaining anything by any extended discussion of Section 5 or any part of it.
>
> MR. STEPHAN: I will then accede to the Examiner's statement and preserve an exception as to whether or not the function presently before us falls within the classification indicated.
>
> PRESIDING OFFICER GODING: Very well. Shall we get on now with interrogation?

Petitioner's position was made sufficiently clear by the quoted statement, and no prejudice ensued from the presiding officer's interjection.

At the completion of the hearing, the record was certified to the Acting Administrator,[1] who made findings of fact and conclusions upon the new evidence (R. Vol. IX, pp. i-vii). His findings were: Pacific oysters canned after blanching are no better than those canned after pre-steaming and many persons regard them as inferior because of material suspended in the liquid and because they break more readily (Finding 9). To attain a given drained weight of oysters account must be taken of the changes in the food which occur during preparation for and in canning, the most significant of which is the loss of liquid from the oysters during heat treatment. The total amount of liquid that separates from the oysters is approximately the same whether the oysters are packed in the container raw, are given partial cooking by blanching, or are partly cooked in the shell by pre-steaming (Finding 10). The difference is that with raw oysters the loss occurs in the can whereas with the other methods the loss occurs partly in the can and partly during the pre-canning operations. The blanching loss and the light pre-steaming loss approximates 16% by weight, the pre-steaming loss generally being slightly higher. The put-in weight of oysters, therefore, is not an accurate measure of fill of con-

[1] Administrator Ewing was absent from duty at the time.

tainer and would be only if all oysters were pre-cooked to the same degree before weighing into the cans (Findings 11-14). When a 5 ounce cut-out weight is used for blanched oysters, a put-in weight of approximately 7½ ounces is necessary; and for a 7 ounce cut-out, a put-in of approximately 9½ ounces is required. Thus the lighter drained weight permits a canner to replace 2 ounces of blanched oysters with 2 ounces of water (Finding 12). The liquid drained from canned oysters has food value and flavor, but it is much less valuable than the oyster meat, and the smaller the put-in weight of oysters the greater the water addition to make up the packing medium (Finding 15). The 5 ounce cut-out can is slack-filled. No new equipment and no significant change in canning procedure is required to meet the 6½ ounce fill (Finding 16). Based upon the number of oysters showing defects, there is no real difference between canned oysters filled to yield 5 ounces of drained weight and those filled to yield 6½ ounces, whether they were pre-steamed or blanched prior to canning (Finding 17). Except for slight differences in flavor and appearance, the food value of the liquid packing medium is approximately the same in cans having the same drained weight regardless of the method used in preparing the oysters for canning. As drained weight increases, packing medium decreases, and the flavor and food value of the liquid packing medium is inversely proportional to the amount of water added to make up the packing medium (Finding 18).

The Acting Administrator concluded that there was no basis for prescribing separate standards of fill based upon the method of preparing oysters for canning; that it would not promote honesty and fair dealing in the interest of consumers to base the standard on put-in-weight or the method of preparing oysters for canning; but that it will promote honesty and fair dealing to base the standard of fill of container on drained weight without differentiation as to whether the oysters are canned raw, or are blanched or pre-steamed before canning. The standard prescribed in the March 10 order was not changed. (R. Vol. IX, p. vii.)

(4) *The Court of Appeals decision.*—The court below held that the orders of March 10 and August 3, 1948, were supported by substantial evidence (174 F. 2d at 685-686, 688-689). It disposed of petitioner's claim that the standard of fill was unreasonable as follows (p. 695):

> * * * it is argued that it is unreasonable that a new method of canning oysters which results in a much higher quality product as shown by established and increasing consumer acceptance should be destroyed, purportedly to protect that very consumer. Therein lies much superficial persuasiveness. A short and sufficient answer is that the findings supported by substantial evidence are, in substance, that the higher requirement of fill will not result in impairment of quality when using petitioner's method of canning blanched oysters.

The court found that the record did not support petitioner's claim that Administrator Ewing had not conscientiously considered the evidence. On the contrary, it pointed to letters from Ewing to petitioner's counsel stating that he had "personally" and "thoroughly" considered the record (174 F. 2d at 695), and to the recitations of regularity in the orders (174 F. 2d at 695-696). The court added (p. 696):

> Furthermore, we cannot allow the Administrator's recitation that he has personally examined and considered the evidence in making his decision to be successfully challenged by a mere allegation in a brief. We have neither moral nor legal right to presume that only those who occupy judicial office respect their obligations and perform their official duties honestly, sincerely and conscientiously. Nor can we presume the subordinate personnel to be a camarilla.

The court affirmed the administrative orders insofar as fill of container was concerned and reversed the orders as to standards of identity. (R. Vol. XI, pp. 33-34).[2]

ARGUMENT

Petitioner presents six questions (Pet. 5-7), but they may be consolidated into the two questions stated above, p. 2. In his statement of the case

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[2] Petitioner was granted stays of enforcement of the Administrator's orders pending decision in the Court of Appeals and disposition of the present petition (R. Vol. XII, pp. 55-61).

(Pet. 13-28), counsel for petitioner repeatedly asserts that it has some sort of vested right to continue a 5-ounce fill in the No. 1 can, that it is unreasonable to fix the fill on cut-out weight instead of on put-in weight, that the Administrator improperly classified Pacific oysters with Gulf oysters for purposes of the standard of fill, and that packing blanched Pacific oysters to meet the 6½ ounce requirement of the Administrator's order is impossible and would result in disfiguration of oysters in the form of browning, pressure blemishes, distortion, twisting and breakage. Since these assertions raise questions of judgment which were the concern of the Administrator, and since the court below has found that the order was based upon substantial evidence, petitioner does not argue these points outside its statement of the case and we shall not take them up specifically. While we are willing to rest upon the Court of Appeals' disposition of these contentions, we feel that there are certain undisputed, fundamental, and basic facts to which the attention of this Court should be directed. As shown by petitioner, the can most generally used in the packing of oysters is the No. 1 EO can, which holds 10.94 ounces of water (Pet. 15). Prior to the issuance of Conservation Order No. M-81, the packers followed the practice of canning oysters to yield 5 ounces drained weight of oyster meat. No amount of argument can successfully refute the proposition that, under this practice, the person who buys a can of oysters the contents of which

weigh about 11 ounces actually receives only 5 ounces of oyster meat. The evidence at the hearing disclosed that the cans of blanched oysters commercially packed by petitioner contained more liquid than oysters when opened and weighed (R. Vol. 7, Ex. 33). This is the situation which the order of the Administrator seeks to correct. All it does is to require that the consumer who purchases the 11 ounce can receive 1½ ounces more of oysters and a correspondingly less amount of liquid.[3]

1. Petitioner claims a denial of procedural due process in the hearing examiner's exclusion of questions calculated to show, so it was alleged, that a witness for the Food and Drug Administration either wrote or had a hand in preparing portions of the findings of fact that appeared in the March 10 order (Pet. 28-30).

The proceeding before the Administrator was not quasi-judicial in character. It was part of the rule making process established by the Act. The standards for canned oysters under consideration affected not only petitioner, but all other oyster

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[3] In the *Quaker Oats* case, 318 U.S. 218, 232, this Court pointed out that the legislative history of the Act manifests a congressional purpose to substitute for informative labeling, standards of identity for food sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive. The same design for consumer protection is manifest in the similar provision in the Act providing for a standard of fill of the food container. It recognizes that some method should be provided to correct a constant practice under which the consumer who purchases a container of food fails to receive as much as he has a reasonable right to expect from a container of that size.

canners throughout the United States. This Court, in *Federal Security Administrator* v. *Quaker Oats Company,* 318 U. S. 218, 228, in passing on another food standard issued under sections 401 and 701 of the Act, stated that the "review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged."

It has long been recognized that the procedural requirements imposed in any given rule-making activity are to be found in the statute which vests authority to issue the regulations. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 303-312. The due process provisions of the Constitution do not require that a hearing be accorded to persons affected by general regulations or legislation. See *Bi-Metallic Investment Co.* v. *State Board, etc.,* 239 U. S. 441; *Bowles, etc.* v. *Willingham et al.,* 321 U. S. 503. Even where notice and public hearing are given, there is no constitutional requirement that an administrative agency make special findings of fact as part of its rule-making process. *Pacific States Box & Basket Co.* v. *White et al.,* 296 U. S. 176.

The Federal Food, Drug, and Cosmetic Act does not preclude consultation between the Administrator and subordinate personnel in food standards proceedings, and the due process clause implies no such prohibition. Since the Constitution requires no hearing at all in rule-making, we find

no basis for the contention that it proscribes the consultation which petitioner attempted to prove.

Petitioner grounds its contention of denial of procedural due process on *Morgan* v. *United States*, 298 U. S. 468, and *Morgan* v. *United States*, 304 U. S. 1, 19-20. These cases were not "ignored" by the Court of Appeals, as petitioner asserts (Pet. 29). The conduct of the administrative proceedings involved here was in accord with the rules announced in those cases. The first *Morgan* opinion includes a statement that the duty of making an order "cannot be performed by one who has not considered evidence or argument," but this Court also said (pp. 481-482):

> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates.

In the second *Morgan* case, the Secretary of Agriculture, in answer to the question whether the order represented his independent conclusion, stated that the order "represented my own independent reactions to the findings of the men in the Bureau of Animal Industry" (304 U. S. at 18). This Court said (*ibid.*):

> In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree

with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport.

The decision in the second *Morgan* case grew out of the circumstances that no specific complaint had been formulated, there had been no examiner's report, and no proposed findings had been submitted for consideration. This Court held that the essentials of a fair hearing could not be met in such a case if the Secretary accepted and adopted as his own findings which were prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents to know the claims and to contest them.[4]

In the present case, pursuant to Section 701(e) of the Act, notice of hearing was published in the Federal Register containing a detailed statement of the proposed regulation (Ex. 1, Vol. IV, following p. 701). After the close of the evidence at the

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[4] It was conceded in the second *Morgan* case that attorneys for the prosecution, assisted by witnesses for the prosecution, had prepared the order for the Secretary. But it was not claimed or held that this circumstance voided the order. See 304 U.S. at p. 8.

first hearing in July 1947, a period of 30 days was set for the submission of findings of fact (R. Vol. IV, p. 651). Following the usual practice, the tentative or proposed order issued by the Administrator on October 4, 1947, provided that any interested person could file exceptions within 20 days. On October 27, 1947, an additional period of 30 days for filing exceptions was granted (R. Vol. II, p. 111). Exceptions to the proposed order were filed by petitioner, by the Pacific Coast Oyster Growers Association, and by other packers (R. Vol. II, pp. 52-110). New counsel filed a brief on petitioner's behalf on February 5, 1948, and conferred personally with Administrator Ewing (R. Vol. II, pp. 51, 52). All of these exceptions and proposals were considered by the Administrator (R. Vol. II, p. 46). A final order was issued on March 10, 1948, approximately five months after the issuance of the tentative order. On that day, Mr. Ewing wrote to petitioner's counsel (R. Vol. II, p. 51):

> DEAR HUGH:
>
> I have given careful consideration to your requests for postponing issuance of a final order and for calling another hearing for the purpose of taking additional evidence in the matter of amending the standard of fill of container for canned oysters.
>
> I have personally examined the record of hearing, and I am convinced that the amendment of the standard of fill of container pro-

posed in the tentative order is based on good substantial evidence.

* * *

Sincerely yours,

OSCAR R. EWING,
Administrator.

After the final order was issued, petitioner's present counsel appeared and requested that it be reconsidered (R. Vol. II, p. 2). Mr. Ewing denied this petition (R. Vol. II, p. 1) and advised counsel that his study of the record had satisfied him that the March 10 order was proper in all respects. Thus, the procedural steps observed here clearly take this case outside the rule of the *Morgan* cases.[5]

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[5] The cases cited by petitioner (Pet. 36-39) as in conflict with the decision below are inapposite. In *Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105 (C.A. 6), coded statistical material was admitted into evidence, but the hearing officer refused to have the data decoded so that the facts could be fully explored on cross-examination. In the case at bar, the petitioner's counsel was allowed every opportunity to cross-examine on material facts. He was stopped only when he undertook to show a violation of Section 5(c) of the Administrative Procedure Act, which, as we show below, is inapplicable in a proceeding of the type involved here. *Berkshire Employees Association* v. *National Labor Relations Board*, 121 F. 2d 235 (C.A. 3), involved possible prejudice on the part of one of the members of the Board. An offer of proof was made to show that the member had attempted through letters to Berkshire's customers to pressure it to cease certain practices which were the subject of inquiry at the hearing. The case was remanded to the Board to hear the evidence. The case at bar involves no charge of bias on the part of either Mr. Kingsley or Mr. Ewing. *Dorsey* v. *Kingsland*, 173 F. 2d 405 (C.A.D.C.), certiorari granted, 337 U.S. 914, No. 53, this Term, involves issues as to the scope of judicial review of a decision disbarring an attorney from practice before the Patent Office. The Federal Food, Drug, and Cosmetic Act clearly makes the substantial evidence rule applicable in this proceeding, and it was properly applied by the court below.

Petitioner also challenges (Pet. 6-7) respondent Kingsley's consideration of the record made at the hearing on the remand. The question is not argued in the petition, and we shall give it only brief consideration. The contention appears to be based upon the certificate Mr. Kingsley signed to authenticate the record of the supplemental hearing, which shows that he considered only the evidence taken at the hearing and not the evidence theretofore reviewed by Mr. Ewing (R. Vol. VI, cover). Petitioner apparently contends that because of the absence of Administrator Ewing, the Acting Administrator could reach a decision on the additional evidence only after having studied the evidence underlying the original order. In this, it relies entirely upon the first *Morgan* case.

It is important to note that the proceedings on the remand were to be conducted within the statutory bounds of Section 701(f)(2), 21 U. S. C. 371(f)(2). It is clear from the statute and the court's order (R. Vol. V, p. 40) that the Administrator was not required to re-hear the entire case. Evidence was to be taken and findings made only upon a narrow issue, i. e., as to the alleged new method of preparing oysters for canning and as to the relationship of such method to a reasonable standard of fill of container. The facts shown by the record are that respondent Kingsley based his supplemental order on the evidence taken at the hearing on the remand and so certified, and that he did in fact refer to the earlier record where necessary to make

comparisons in his findings of fact (R. Vol. IX). The record shows that Mr. Kingsley read the earlier findings and conclusions of Mr. Ewing and that he was thoroughly familiar with the March 10 order. The findings made by Mr. Kingsley did not change any finding previously made; they were supplemental findings which were consistent with the earlier findings of Mr. Ewing. Nothing in the *Morgan* decisions required that the Acting Administrator personally review the matters that had already been decided by Mr. Ewing before making his findings on the new questions interjected by petitioner.

2. Petitioner contends (Pet. 30-34) that it was denied the right to show that the March 10 order was made in violation of the separation of functions requirements of Section 5(c) of the Administrative Procedure Act, 60 Stat. 237, 239; 5 U. S. C. 1004(c), which prohibits officers or employees of an agency from participating or advising in the decision of any case in which they performed investigative or prosecuting functions.

We think it is clear that Section 5(c) is inapplicable to the rule making proceeding involved in this case. Prior to the passage of the Administrative Procedure Act, Congress and a host of legal specialists in the field of administrative law struggled with the task of prescribing an intelligent code of fair administrative procedure in all agency activities. In all of the reports, debates and com-

ments and, most important, in the scheme and context of the law itself, the distinction between rule making and adjudication was made clear. The historical development of the distinction between these two classes of proceedings was recognized and restated. "The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions." *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 50. In the framework of the Act separate sections deal exclusively with rule making and adjudication: section 4 is concerned with "rule making," [6] section 5 deals expressly with "adjudications," [7] and section 7 and 8 fix rules governing hearings and decisions in both classes of proceed-

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[6] Sec. 2(c), 5 U.S.C. 1001(c): "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

[7] Sec. 2(d), 5 U.S.C. 1001(d): "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

ings. As specifically stated by the Judiciary Committees of both the Senate and the House of Representatives when reporting the bill which later became the Administrative Procedure Act, it was not intended that rule making should be subject to any provision of Section 5. S. Rep. 752, 79th Cong., 1st sess., p. 18; H. Rep. 1980, 79th Cong., 2d sess., p. 30. See also S. Doc. 248, 79th Cong., 2d sess., pp. 24, 25.

Petitioner argues, however, that Section 5(c) should be applied in a rule-making proceeding that involves sharply controverted factual issues. The Court of Appeals properly disposed of this contention as follows (R. Vol. XI, p. 24; 174 F. 2d 693):

> Cited in support [of this contention] are excerpts from Congressional hearings to the effect that in such a situation, "good practice" would be for the agencies to follow the rule laid down for adjudications. As a matter of policy, such may be true, but the Act as finally enacted did not so provide and we cannot believe that the omission was the result of oversight.[8]

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[8] The motion of the State of Washington for leave to file a brief as *amicus curiae* and the brief offered in support of the petition here proceed upon the mistaken assumption that the orders entered in the administrative proceeding will adversely affect canned Pacific oysters. Both the Administrator and the court below have found upon substantial evidence that the new standard can be met without quality deterioration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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